

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 20 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

DOUGLAS DWAYNE GAINES,

Appellant.

2 CA-CR 2006-0230
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200401001

Honorable Kevin D. White, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Harriette P. Levitt

Tucson
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 A jury found appellant Douglas Dwayne Gaines guilty of aggravated assault, a class three felony and dangerous nature offense. It found him not guilty of a related charge of kidnapping. The trial court sentenced him to a presumptive, 7.5-year prison term. On appeal, Gaines contends that there was insufficient evidence to support the verdict and that

a statement by the prosecutor in closing argument denied him his constitutional right to a fair trial. We affirm.

¶2 We view the evidence in the light most favorable to upholding the verdict, and we resolve all reasonable inferences against the defendant. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005); *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000). So viewed, the evidence established that the victim, Nicole D., then seventeen years old, was walking to her friend Sarah’s house when a familiar white Monte Carlo stopped near her. Two masked females emerged and forced Nicole into the car, which was being driven by Gaines. Shortly thereafter, Gaines stabbed Nicole.

¶3 For the preceding three months, Nicole had been selling methamphetamine for Gaines. In the process, she had seen him in person multiple times each week. The week before this incident, Nicole had told Gaines she “was done” and was not going to sell methamphetamine for him any longer. Gaines had become “very upset” at the news, had told Nicole she could not quit, and had threatened to “come after” her, her friends, and her family if she did.

¶4 The next time Nicole saw Gaines was the day he stabbed her. After his accomplices had forced Nicole into the car, Gaines told her “that if [she] did not come back and continue working for him, that he was going to kill [her]” or hurt her family, “whichever one he could do first.” As the white car approached the home of Nicole’s friend Sarah, Nicole told Gaines she was not afraid of him and was not going to continue selling drugs. Gaines then stabbed her in the abdomen, and his accomplices pushed her out of the moving

vehicle directly in front of Sarah's house. Helped into the house by Sarah, who called 911, Nicole was ultimately transported by air to Phoenix where she underwent abdominal surgery.

¶5 Every conviction must be supported by "substantial evidence." Ariz. R. Crim. P. 20(a), 16A A.R.S. "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996); *see also State v. Terrazas*, 189 Ariz. 580, 586, 944 P.2d 1194, 1200 (1997). "[O]nly if 'there is a complete absence of probative facts to support [the jury's] conclusion'" will we reverse a conviction for insufficient evidence. *Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d at 394, *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988); *see also State v. Alvarado*, 178 Ariz. 539, 541, 875 P.2d 198, 200 (App. 1994).

¶6 Gaines claims the evidence was insufficient to sustain his conviction for aggravated assault based on inconsistencies between the pretrial statements and the trial testimony of Nicole's friend Sarah and on officers' failure to find any corroborating physical evidence, such as Nicole's blood in the car, the clothing she had described Gaines as wearing, the weapon used to stab her, or even any drugs in the apartment where he was staying. As a result, Gaines maintains, there was "not a scintilla of evidence sufficient to sustain a conviction." He does, however, acknowledge Nicole's unequivocal testimony that he was the person who had stabbed her and her explanation of his motive for doing so.

¶7 Obviously, the jury found Nicole’s account believable, and her testimony alone supplied more than a “scintilla of evidence” to support Gaines’s conviction for aggravated assault. The evidentiary value of Nicole’s testimony was not negated either by the lack of corroborating physical evidence beyond her stab wound or by the existence of inconsistencies or conflicts in the evidence. Gaines’s arguments actually concern witness credibility and the plausibility, consistency, and weight of the evidence adduced, all matters that are entrusted to the finder of fact. *See State v. Rivera*, 210 Ariz. 188, ¶ 20, 109 P.3d 83, 87 (2005) (inconsistencies in testimony affect credibility of witnesses and weight to be accorded evidence, issues fact-finder resolves); *State v. Montano*, 204 Ariz. 413, ¶ 69, 65 P.3d 61, 74-75 (2003) (weight of evidence within province of jury); *State v. Williams*, 111 Ariz. 175, 177-78, 526 P.2d 714, 716-17 (1974) (“A conviction may be had on the basis of the uncorroborated testimony of the prosecutrix unless the story is physically impossible or so incredible that no reasonable person could believe it.”). We find ample evidence in the record to sustain the jury’s verdict and thus reject Gaines’s claim of insufficiency.

¶8 In his other issue, Gaines contends prosecutorial misconduct in closing argument created fundamental error that deprived him of a fair trial. Although he did not object below, he now complains about the prosecutor’s suggestion in his closing remarks that Sarah’s claimed inability to recall at trial much of the substantive information she had given officers after the stabbing was probably due to her fear “of what may happen if she comes in and tells the truth.” By failing to object contemporaneously, Gaines waived his

right to relief for all but fundamental error causing demonstrable prejudice to his defense. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 18-22, 115 P.3d 601, 607-08 (2005).

¶9 We agree with the state that the prosecutor's comments were neither improper nor a source of error. They were, rather, an invitation to the jury to draw a particular, reasonable inference from the discrepancies between Sarah's original statements to police and her claimed inability at trial to remember the same information. Gaines has failed to cite the specific statements to which he refers, but we assume they are the following:

[O]bviously, you got this impression at trial that the Sarah V[.] who talked to the police on the day of the crime was a very different Sarah V[.] from what you saw on the witness stand. I told you you were going to see that at the beginning of the trial.

She comes in here, and it's barely as if she was even there. She doesn't remember anything.

Why do you think that is, ladies and gentlemen? Do you think she doesn't remember anything because she suffered from the worst case of amnesia in the whole world? Or do you think she comes in here and doesn't say anything, because she knows who she's been called to come in here and testify against, and she's sitting up there scared?

She doesn't want to say what happened. Not because she didn't see what happened. She's afraid of what may happen if she comes in and tells the truth.

¶10 What Gaines mischaracterizes as the prosecutor's suggestion that Gaines had threatened Sarah was, rather, a suggestion that Sarah—for reasons neither discussed nor intimated—was afraid of Gaines and of the possible consequences of testifying against him. Given that Gaines had stabbed Nicole in front of Sarah's house within days after Nicole had angered him by announcing she would no longer work for him, it would be a reasonable

inference that Sarah might well have feared Gaines's wrath and retaliation if she testified against him in court. It would be equally reasonable to infer that the divergence between her original statements to officers shortly after the crime and her later testimony at trial was attributable to that fear.

¶11 Thus, we reject Gaines's claims in his reply brief that the prosecutor's statement was unsupported, inflammatory, and prejudicial. We find it instead to have been permissible advocacy of a reasonable inference the prosecutor hoped the jury would draw from the evidence. *See State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993) (in closing arguments, "counsel may . . . urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions"); *State v. Dumaine*, 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989) (counsel have wide latitude in closing argument to "comment on and argue all justifiable inferences which can reasonably be drawn from the evidence adduced at trial").

¶12 Even if the prosecutor's statements had been improper and even had error occurred, Gaines cannot demonstrate the prejudice necessary to establish fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608. Undisputed was the fact that Nicole had been stabbed in the abdomen by an assailant whom she positively identified as Gaines, the person she had known as Douglas Cooper, with whom she had had direct personal contact on more than thirty occasions over the three months immediately preceding the stabbing. Also undisputed was the fact that, en route to the police station, Gaines had asked spontaneously, "How did you guys find me?"

¶13 And, despite the various details Sarah claimed she could no longer recall, she still testified at trial that, from inside her house, she had heard Nicole scream, had immediately looked out the window, and had seen Nicole “bleeding on the ground” near the street in front of the house. Sarah testified she had also seen, turning the corner, a white car driven by a black man with short hair whose appearance matched Gaines’s. She acknowledged having previously met Gaines at his house “a few months” before the stabbing. Further, she testified, Nicole had told her just before Sarah dialed 911 that it was Gaines who had stabbed her.

¶14 Because Sarah’s testimony merely corroborated Nicole’s and was not independently essential to the prosecution’s case, it is extremely unlikely that the jury’s verdict could have been influenced either by the disparities in Sarah’s statements over time or by the prosecutor’s suggestion that the reason for her claimed lack of recall was that she was fearful of Gaines. Consequently, finding neither reversible nor fundamental error, we affirm the judgment of conviction and the presumptive sentence imposed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge